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Nos. 83-1013, 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC,
Respondent;

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITIONS

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QUESTION PRESENTED

Whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(*l*), prohibits EPA from granting variances from national pretreatment standards for toxic pollutants.

PARTIES

In addition to those named in the caption, the parties are: American Cyanamid Corporation, FMC Corporation, and Union Carbide Corporation.

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Respondent.

OPINION BELOW

The opinion of the court of appeals (CMA Pet. App. A1-A96)[1] is reported at 719 F.2d 624.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are reproduced at CMA Pet. App. A116-A121 except for Sections 301(c) and (g), 306(b), 307(d), and 509(b)(1), 33 U.S.C. (& Supp. V) 1311(c) and (g), 1316(b), 1317(d), and 1369(b)(1), which are set forth in the Appendix at A1–A4. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at CMA Pet. App. A122-A127.

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[1] "CMA Pet. App." refers to the appendix to the petition in No. 83-1013. The two petitions from the decision below are distinguished herein by reference to the petitioner. Thus, "CMA Pet." refers to the petition in No. 83-1013 filed by the Chemical Manufacturers Association, *et al.* "EPA Pet." refers to the petition in No. 83-1373 filed by the United States Environmental Protection Agency.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et. seq.*, directs EPA to control two types of industrial polluters: (1) "direct" dischargers, which dump their waste water directly into navigable waters, and (2) "indirect" dischargers, which dump their waste water into municipal sewage treatment plants which, in turn, discharge to navigable waters.

When the law was first enacted, Congress required direct dischargers to meet two progressively more stringent technology-based requirements: "best practicable control technology currently available" (BPT) by July 1, 1977, and "best available technology economically achievable" (BAT) by July 1, 1983 (later amended to July 1, 1984). 33 U.S.C. (& Supp. V) 1311(b)(l)(A) and (b)(2)(A) and (C). Indirect dischargers had to meet "pretreatment standards" designed to protect both the environment and the sewage treatment plant. 33 U.S.C. 1311(b)(1)(A) and (2)(A) and 1317(b). The pretreatment standards were especially important because municipal sewage plants are often not designed to treat industrial waste water. Without pretreatment, toxic industrial chemicals can pass through the sewers into rivers and drinking water supplies, contaminate large volumes of sludge, or impair the effectiveness of the sewage treatment plant, negating the benefits of a multi-billion dollar investment in pollution control. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 690-691 (1978) [hereinafter cited as 1977 *Legis. Hist.*]

In 1977, Congress took stock of the law, finding reason for both solace and alarm. Progress controlling conventional pollutants, the principal targets of BPT requirements, had been greater than anticipated. *Id.* at 330, 335, 1101. However, EPA had not issued the pretreatment standards on schedule, to the consternation of both houses of Congress. *Id.* at 691, 1213. In addition, the principal regulatory mechanism for control of toxics had failed, amidst mounting evidence of the seriousness and ubiquity of these pollutants. *Id.* at 325-326, 334, 452.

Congress therefore ordered a "major redirection and refinement" of EPA's regulatory program to strengthen control of toxics. *Id.* at 326. First, it elevated the importance of pretreatment and BAT requirements. It directed EPA to use these requirements to control toxics and, in the case of pretreatment standards, enacted several strengthening amendments. *Id.* at 689-693. Second, it considered when, and under what conditions, sources should be able to obtain variances from BAT and pretreatment requirements. It created a new "safety valve" to give flexibility to BAT limitations,[2] and amended a BAT variance provision that had been in the 1972 law,[3] specifying in each case that these modifications would not be available for toxic pollutants. It did not create any variances from the pollution control requirements of pretreatment standards, but it did allow indirect dischargers to get a "credit" for removal occurring at the municipal sewage treatment plant, in effect splitting the pollution control between the indirect discharger and the sewage treatment plant.[4] Simultaneously, it enacted Section 301(*l*), 33 U.S.C (Supp. V) 1311(*l*), which said: "The Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant ***." It stressed that EPA could only modify requirements for non-toxic, conventional pollutants, and urged EPA to err on the side of caution in applying this mandate.[5]

Despite these directives, EPA subsequently issued regulations which allowed industries to obtain variances from pretreatment standards for toxic pollutants. 40 C.F.R. 403.13

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[2] Section 301(g), 33 U.S.C. (Supp. V) 1311(g), p. A1, *infra*; 1977 *Legis. Hist.*, *supra*, at 674-675.

[3] Section 301(c), 33 U.S.C. 1311(c), p. A1, *infra*; 1977 *Legis. Hist.*, *supra*, at 328-329.

[4] Section 307(b), 33 U.S.C. (Supp. V) 1317(b); 1977 *Legis. Hist.*, *supra*, at 461-462.

[5] *E.g.*, "In order to reemphasize that modifications to BAT are intended for non-toxic, conventional pollutants only, the bill prohibits variances for [toxic] pollutants***. The committee's intent is to prohibit both those pollutants known to be toxic or hazardous and those suspected of being toxic or hazardous." 1977 *Legis. Hist.*, *supra*, at 677.

(CMA Pet. App. A122-A127).[6] The Third Circuit held that these so-called "fundamentally different factors" or "FDF" variances violated Section 301(*l*).

REASONS FOR DENYING THE PETITIONS

The Third Circuit's decision does not conflict with the decision of any other Circuit, is entirely consistent with this Court's prior interpretation of the Clean Water Act, does not present issues sufficiently important to warrant this Court's attention, and is required by the express language of the statute and the legislative history. Review by this Court is not warranted.

1. The Third Circuit's decision does not conflict with the decision of any other Circuit.

a. The Third Circuit held that Section 301(*l*) prohibits variances from *pretreatment* standards for toxic pollutants. No other court of appeals has addressed the applicability of Section 301(*l*) to pretreatment standards, since all challenges to the variance provision for the pretreatment program were consolidated in the Third Circuit. There is no conflict among the Circuits on this question; hence EPA's fear of "substantial uncertainty and confusion" (EPA Pet. 8) is a non sequitur.

b. Lacking any conflict between the holdings of the Circuits, petitioners complain that the Third Circuit's reasoning is inconsistent with that used by the Fourth Circuit to validate variances from *BPT limits* for toxic pollutants. See *Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1047-1048 (1980).[7] Even if a difference in reasoning between the Circuits were sufficient to warrant this Court's review, no purpose would be served by reviewing the reasoning of either Circuit. The Fourth Circuit wrestled with an issue which will not recur: whether Congress, focused on the future direction of the pollution control program, intended Section 301(*l*) to apply

[6] The regulations were issued on June 26, 1978, 43 Fed. Reg. 27736-27773, and amended on January 28, 1981, 46 Fed. Reg. 9404-9460.

[7] Petitioners did not even cite *Appalachian Power's* discussion of § 301(*l*) to the Third Circuit, thus belittling its importance to this case.

retroactively to BPT limits issued before the 1977 amendments. It concluded that Congress did not, relying heavily on the maxim that retroactive application of a statute is not favored. *Id.* at 1047.

That anomaly is not present here, where the pretreatment standards were developed well after the 1977 amendments, nor will it recur in the programs for either direct or indirect dischargers. The focus of the national clean water program shifted in 1977 from development of BPT limits to BAT and pretreatment. The Third Circuit gave EPA a clear directive on how to proceed with the post-1977 standards; there is no contrary directive from any other court.[8]

2. The Third Circuit's decision does not conflict with any decision of this Court.

a. This case has nothing to do with this Court's decision in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). *DuPont* addressed two questions: whether EPA had authority to issue industry-wide regulations for existing plants under the Clean Water Act—it held that EPA had; and whether nonstatutory variances were available for industry-wide standards for new sources under the same Act—it held that they were not.

The question before the Third Circuit was whether Section 301(*l*), enacted after *duPont*, prohibits FDF variances from pretreatment standards for toxic pollutants. This turns on the meaning of Section 301(*l*), something *duPont* could not address. Therefore, it is not surprising that the Third Circuit's decision does not even address *duPont* in its discussion of Section 301(*l*). (CMA Pet. App. A40-A43).

DuPont is, of course, relevant to the issue that the Third Circuit declined to address. NRDC argued below that all FDF variances from pretreatment standards were illegal. The Third

[8] A pending case in the D.C. Circuit may raise the issue of the applicability of § 301(*l*) to BAT requirements for direct dischargers. This case was placed on the court's inactive docket and, regardless of how it is ever resolved, will not affect the pretreatment standards at issue here. *NRDC, et al.* v. *EPA*, Nos. 80-1607, *et al.*

Circuit found it unnecessary to reach this issue because it found that EPA had only issued pretreatment standards for toxic poilutants and these cannot be varied due to the restriction in Section 301(*l*). (CMA Pet. App. A38-A40). EPA has since issued a new FDF variance rule which restricts the availability of the variance to pretreatment standards for nontoxic pollutants. 49 Fed. Reg. 5131-5132 (February 10, 1984). There has been no judicial review of this rule; hence, review by this Court would be premature.

b. Petitioners' arguments are at odds with *duPont*. *DuPont* tried to reconcile the Clean Water Act's description of BPT as a requirement applicable to "point sources" with the overall statutory scheme which calls for BAT (and pretreatment and new source standards) to be set for "categories and classes" of sources. The Court concluded that BPT, like BAT, can be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations." 430 U.S. at 128. *DuPont* did not, as EPA claims, hold that nonstatutory variances are appropriate for BAT requirements. To the contrary, the Court upheld EPA's BAT limits even though they did not contain an FDF variance clause.[9]

Dupont did, however, strike down nonstatutory variances for new source standards for reasons equally applicable to pretreatment standards. Both pretreatment and new source standards are set for categories of sources, rather than individual point sources. Cf. § 307(b)(3), 33 U.S.C. 1317(b)(3), with § 306(b), 33 U.S.C. 1316(b), p. A2–A3, *infra*. The pretreatment, unlike BPT limits, are expressly labelled "standards" in the Act. *Id*. Pretreatment, like new source, standards may require "no discharge."[10] As with new source standards,

[9] As the Court explained, "The regulations for each subcategory contain a variance clause, *applicable only to the [BPT] limitations*." 430 U.S. at 122-123 (emphasis added).

[10] Section 307(b)(1), 33 U.S.C. 1317(b)(1), specifies that a pretreatment standard must "*prevent* the discharge of *any* pollutant *** which *** interferes with, passes through, or otherwise is incompatible with [the publicly owned treatment works]." (emphasis added).

it is "unlawful for *any* owner or operator of *any* source to operate *any* source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d), p. A4, *infra* (emphasis added). Finally, there is no statutory provision for variances,[11] and a variance provision would be inappropriate because pretreatment, like new source, standards were intended to ensure national uniformity and maximum feasible control.[12] See generally 430 U.S. at 138.

c. This Court has twice spoken on the subject of variances under the Clean Water Act. *DuPont*, *supra*, and *EPA* v. *National Crushed Stone Assn.*, 449 U.S. 64 (1980).[13] Its decisions are clear and do not conflict with the Third Circuit's decision. There is no need once again to address variances under this Act.

3. The FDF variance for indirect dischargers is not sufficiently important to warrant this Court's attention.

a. Few companies are interested in the FDF variance. Approximately 11,316 indirect dischargers (83% of the total)[14] were covered by categorical pretreatment standards when the

[11] Sources may be able to get a "credit"' for pollutant removal occurring at the publicly owned treatment works, § 307(b)(1), 33 U.S.C. (Supp. V) 1317(b)(1), but there are no exceptions to the level of control demanded by the standards.

[12] The Senate Committee explained the rationale for pretreatment standards as follows: "The only way to avoid [the contaminated sludge disposal] problem is to prevent, *to the maximum extent feasible*, the industrial pollutants from entering [the municipal sewage] plant in the first place." 1977 *Legis. Hist.*, *supra*, at 690 (emphasis added). Thus, pretreatment standards are set at the national level, with EPA responsible for seeing that local authorities ensure, at a minimum, compliance with the federal limits. *Id*. at 461, 691-693.

[13] *National Crushed Stone Assn*. held that the considerations underlying BPT and BAT differed; therefore, EPA could not grant BPT variances based on the economic capability of the individual discharger, even though it could grant statutory BAT variances on these grounds.

[14] In 1977, when this rulemaking began, EPA estimated that 60,000 industrial facilities would be covered by categorical pretreatment standards; it now believes that 13,696 is a more accurate estimate. (p. A5–A6, *infra*).

court of appeals rendered its decision.[15] Only 12 companies had applied for an FDF variance.[16]

b. The decision below will have no adverse impact on the administration of the Clean Water Act. It will not, as petitioners theorize, make "existing regulations *** more vulnerable to challenge by plants affected by fundamentally different factors." (EPA Pet. 11). Deadlines for filing FDF variance applications had expired for over 80% of the sources in the program when the court of appeals rendered its decision. Since only a handful of companies applied, few are situated to challenge the regulations because of alleged differences with other plants in the same industrial category. No useful purpose would be served—indeed, it would delay enforcement of this program—to allow these plants to raise excuses for noncompliance for the first time now that EPA's rules are final.

c. Nor will the decision below affect EPA's ability to issue new pretreatment standards in compliance with the Agency's "stringent deadlines." (EPA Pet. 11) In the first place, since few indirect dischargers avail themselves of the FDF variance, incorporating their concerns in the national rulemaking will not significantly burden EPA.

Second, EPA routinely considers unique features of individual plants in establishing national rules for both direct and indirect dischargers, notwithstanding its desire to focus "on the more typical plants." (EPA Pet. 12). Indeed, requests to establish separate subcategories for one or a few plants which are somehow "different" from others in the same industrial category are a common feature of these rulemakings.[17]

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[15] An additional 329 indirect dischargers are covered by standards issued since the court of appeals decision, although no additional variance applications have been filed. (pp. A5–A7, *infra*).

[16] P. A7, *infra*. One company filed variance applications for two plants; another, for 24 plants.

[17] See, *e.g.*, *Association of Pacific Fisheries* v. *EPA*, 615 F.2d 794, 808 n.10 (9th Cir. 1980) (subcategories divided for analytical purposes into subdivisions of one, two, or three plants); *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1246 (10th Cir. 1979) (subcategorization of two mills was

(footnote continues)

Finally, the courts below have repeatedly extended EPA's deadlines—often with the express consent of NRDC—where the Agency could identify legitimate problems with its data base.[18] There is no reason to believe that they will act any differently in the future, should the data show that some plants present unique compliance problems which merit more extended consideration.

d. The cases petitioners cite do not help their cause. They are either irrelevant[19] or suggest that EPA does not need an FDF variance for the reasons claimed (*i.e.*, for subcategorizing "based on factors that would have justified, if not required, the creation of that subcategory during the rulemaking *had EPA been aware of and taken those factors into*

(footnote continued)

arbitrary); *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027, 1050-1051, (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978) (addressed sole plant in country with water supply problem). Indeed, subcategorization has been one of the most frequently disputed issues in litigation over EPA's effluent limitations. Report of the Effluent Standards and Water Quality Information Advisory Committee, reprinted in *Implementation of the Federal Water Pollution Control Act, Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 197-208 (1976).

[18] EPA's deadlines are embodied in a consent decree entered into with NRDC and approved by the district court in 1976. *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom. NRDC* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom. NRDC* v. *Gorsuch*, Nos. 2153-73, *et al.* (D.D.C. Oct. 26, 1982), modified *sub nom. NRDC* v. *Ruckelshaus*, Nos. 2153-73, *et al.* (D.D.C. Aug. 2, 1983 and Jan. 6, 1984). A petition for certiorari, filed by industries challenging provisions of the consent decree other than the deadlines, is now pending before this Court. *Union Carbide Corp., et al.*, v. *Natural Resources Defense Council, Inc., et al.*, No. 83-1345.

[19] None of the cases petitioners cite address Section 301(*l*). Moreover, *American Iron and Steel Institute*, n.17 *supra*, predated enactment of Section 301(*l*); *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978) addressed only nontoxic pollutants; and *Kennecott*, 612 F.2d at 1243, upheld EPA's industry-wide standards relying, in large part, on the statutory obligation to base effluent guidelines on the "best plant," rather than on the FDF variance.

account"). (EPA Pet. 15) (emphasis added).[20] Instead, EPA used the FDF variance as a fig leaf for embarrassingly discordant facts already in the record.[21] This bureaucratic concern, rather than any "issue of fundamental importance to the administration of the Clean Water Act," propels EPA's petition.[22]

4. The court of appeals correctly decided that the Clean Water Act prohibits FDF variances from pretreatment standards for toxic pollutants.

Petitioners argue that the court below erred by not accepting EPA's construction of Section 301(*l*) of the Clean Water Act. An agency's interpretation of a statute is not, however, entitled to deference where, as here, it contradicts

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[20] Both *Kennecott* and *AISI* placed the burden of marshalling information squarely on industry's shoulders. When EPA encountered factors of which it had not been aware (*e.g.*, ferrocyanide formation, 612 F.2d at 1245; water scarcity, 526 F.2d at 1050; and engineering factors, 526 F.2d at 1049), the courts found fatal fault with industry's failure to produce adequate information during the rulemaking.

[21] *E.g.*, in *Kennecott*, EPA fell back on the FDF variance when confronted with countervailing factors which it had been "fully aware of" for nearly two years before completing the rulemaking. 612 F.2d at 1243; 43 Fed. Reg. 29771 (1978). Likewise, in *AISI*, 526 F.2d at 1061, EPA proffered the FDF variance in response to industry criticism of its sinter plant data base, even though the flaw at issue had been clearly pointed out to EPA during the rulemaking. 39 Fed. Reg. 24114, 24115 (1974).

[22] CMA also cites *SEC* v. *Chenery*, 332 U.S. 194 (1947), arguing that EPA should have discretion to choose whether to regulate atypical plants through general rules or individual, *ad hoc* decision-making. *Chenery*, however, is irrelevant because here Congress made the choice for EPA. Congress told EPA to issue standards which prevent harmful pollutants from entering municipal sewage treatment plants, and to "designate the category or categories to which such standard shall apply." Section 307(b)(3), 33 U.S.C. 1317(b)(3). In fact, Congress expressly said that the pretreatment standards "would be national in scope and addressed to the most significant pretreatment problems. [They] would vary with the broad type of treatment processes used, but the Committee does not intend that each individual treatment works would have its pretreatment standards set up by the Administrator." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93d Cong., 1st Sess. 800 (1973).

the clear language of the statute,[23] is not well-reasoned,[24] and frustrates the statutory scheme for strict control of toxic pollutants.[25]

a. Section 301(*l*) of the Clean Water Act is clear: it provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Pretreatment standards are indisputably requirements of Section 301. EPA's FDF variance would nonetheless have allowed EPA "on a case-by-case basis" to "adjust" pretreatment standards, making them less stringent for some plants.[26] Relying on both the common usage of the language and the legislative history, the court of appeals correctly ruled that these changes "modify" pretreatment standards so as to fall within the prohibition of Section 301(*l*). (CMA Pet. App. A40-A43).

b. EPA's construction of the statute, by comparison, is a house of cards. First, EPA draws a negative inference: because Sections 301(c) and (g) use the term "modification,"[27] Congress must have intended to rule out these statutorily created variances, not "nonstatutory" variances such as the FDF. This argument violates the well-established rule that, where Congress has expressly created exceptions to a statute, "nonstatutory" exceptions are not available. *TVA* v. *Hill*, 437 U.S. 153, 188 (1978). In addition, it makes Section 301(*l*) largely redundant — at least insofar as it applies to Section 301(g), which by its terms cannot be applied to toxics.

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[23] *SEC* v. *Sloan*, 436 U.S. 103, 117-119 (1978).

[24] *U.S.* v. *Cartwright*, 411 U.S. 546, 557 (1973).

[25] *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272-275 (1968) (rejected narrow reading of statutory provision because it did not square with the structure of the statute).

[26] 40 C.F.R. 403.13(b). (CMA Pet. App. A122). The rules would also have allowed EPA to make pretreatment standards "more stringent," but this addition is purely disingenuous, as all FDF variance applications for both direct and indirect dischargers have sought weaker, not stronger, pollution control limits.

[27] Section 301(c), 33 U.S.C. 1311(c), p. A1, *infra*, allows BAT standards to be modified if they surpass the economic capability of the discharger. Section 301(g), 33 U.S.C. (Supp. V) 1311(g), p. A1–A2, *infra*, allows similar modifications to BAT standards where water quality warrants.

Next, EPA asserts that an FDF variance is not a "modification;" admittedly, "a Member of Congress" used the words "variance" and "modification" interchangeably during floor debate,[28] but this, says EPA, does not suggest that the whole of Congress thought the terms were akin. The speaker was, however, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and principal author of the 1977 amendments on toxics. His words, entitled to considerable weight on their own, are buttressed here by EPA's own interchangeable use of "variance" and "modification" in its Senate testimony,[29] and the equation of the two terms by both the Senate Committee[30] and this Court.[31]

Last, EPA asserts its "most telling" point: Congress did not criticize either the "well-established" practice of granting FDF variances from BPT requirements, or this Court's *duPont* decision when it enacted Section 301(*l*). EPA's practice was, however, hardly "well-established." Less than 50 of 4,000 major industrial dischargers covered by BPT limits before 1977 had applied for FDF variances; only two plants had actually received a variance. (p. A8–A9, *infra*). Nor would *duPont* have caused Congress to be concerned about variances for BAT and pretreatment requirements since the BAT limits reviewed in *duPont* contained no FDF variance clause (even though the BPT limits did). 430 U.S. at 122-123.

Congress's failure to examine the further theoretical availability of FDF variances in the BPT rules proves nothing. BPT was merely an interim measure before final pollution controls. 1977 *Legis. Hist.*, *supra*, at 459. Since most sources had complied, *Id.* at 641, and the pollution control results had been greater than anticipated, *Id.* at 330-331, Congress had no need to examine carefully EPA's handling of individual dischargers.

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[28] 1977 *Legis. Hist.*, *supra*, at 461.

[29] *Id.* at 1102. EPA called the statutory 301(c) modification provision a "variance."

[30] *Id.* at 676-677. The Committee called the statutory 301(g) modification provision a "variance."

[31] In *National Crushed Stone Assn.*, *supra*, this Court referred to the statutory 301(c) modification provision as a "variance."

Moreover, BPT (and the early BAT limits) focused primarily on conventional pollutants, not toxics. *Id.* at 335, 1101. Both Congress's and EPA's attention in 1977 shifted sharply toward control of toxic pollutants and the BAT and pretreatment requirements designed to control them. *Id.* at 1135-1136. Since Congress considered, and curtailed, the circumstances under which these requirements could be modified, it does not make sense to assume that Congress, without mention, would have simultaneously authorized EPA to grant nonstatutory variances for toxic pollutants.

c. Lacking a compelling legal argument, EPA turns to policy, alleging that an FDF variance functions differently from a modification. Put simply, this argument supposes that an FDF variance is not a "variance" at all, but rather a part of the standard-setting process in which EPA recognizes prior errors. The Clean Water Act, however, contains statutory mechanisms for correcting EPA's rulemaking errors. The Act requires EPA to revise its rules following the same streamlined, informal rulemaking procedures used to set pretreatment standards in the first place.[32]

Congress's solution to the problem of rulemaking error is both more direct and more uniform than the variance route EPA created. The FDF variance procedure entails review by four separate tiers of government, an informal public comment period, a hearing, and coordination between EPA's rulemaking experts and diffuse state and regional office personnel.[33] Not surprisingly, the process has been extraordinarily slow of resolution.

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[32] Section 307(b)(2), 33 U.S.C. 1317(b)(2), directs EPA to revise pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change," following the same procedures used to set pretreatment standards in the first place. In addition, section 509(b)(1), 33 U.S.C. 1369(b)(1), p. A4, *infra*, gives aggrieved sources 90 days to ask a court to remand EPA's rules unless the challenge is based on information arising after 90 days.

[33] An application is reviewed by the state, the EPA Enforcement Division Director, the EPA Regional Administrator, and the EPA Administrator. 40 C.F.R. 403.13. (CMA Pet. App. A122).

Experience with BPT requirements shows that once a plant files an FDF variance application, it enters a regulatory limbo. Plants which applied for an FDF variance from BPT requirements before 1980 are still awaiting EPA's decision.[34] Some of these applications date to 1976 and 1977. As long as EPA demurs, the applicants are unwilling to make the required capital expenditures for pollution controls. This creates inequity within regulated industries since companies which postpone pollution control expenditures gain a competitive edge over those which pay to install, operate, and maintain controls.

Experience also shows that many variance applications lack merit.[35] Yet variance applications delay enforcement efforts,[36] permitting toxic discharges to continue in excess of the limits intended by Congress. In addition, they reward companies which fail to bring relevant information to EPA's attention during a rulemaking. Congress therefore took a dim view of variances, labelling them "resource-intensive" and "time consuming"[37] and carefully circumscribing, through Section 301(*l*), their availability where toxic pollutants are concerned.

Petitioners' construction of the Act ignores the clear language of Section 301(*l*), is inconsonant with the overall statutory scheme for strict control of toxic pollutants, and

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[34] Variance applications 76-09, 77-06, 77-14, 77-15, 77-16, 78-02, 78-05, 79-01, and 79-03 are still pending, according to EPA's January 31, 1984 status report.

[35] *E.g.*, EPA approved only four of the 53 BPT variance applications. Fourteen were denied; 16 withdrawn. The rest are still pending. (p. A8-A9, *infra*).

[36] Congress rejected a proposal for case-by-case extensions of the 1977 deadline for meeting BPT limits for this very reason. At the end of EPA's decision-making process, those denied a variance would "almost certainly" appeal to the courts, perhaps obtaining a stay from the applicable requirement. This, in turn, would mean that "these discharges would continue unabated until final judicial resolution, first of the variance, and then, if necessary, of the ensuing enforcement order." 1977 *Legis. Hist.*, *supra*, at 861-862.

[37] *Id.* at 861-862.

would give a handful of companies an unfair competitive advantage over the more than 11,000 sources now embarking on a pollution control program. The Third Circuit correctly rejected it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
FRANCES DUBROWSKI
Counsel for the Natural Resources Defense Council, Inc.

April 2, 1984

APPENDIX

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CLEAN WATER ACT PROVISIONS

1. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. 1311(c):

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July !, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

2. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(g):

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) Such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which

may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

3. Section 306(b) of the Clean Water Act, as amended, 33 U.S.C. 1316(b):

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;

nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

4. Section 307(d) of the Clean Water Act, as amended, 33 U.S.C. 1317(d):

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

5. Section 509(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1369(b)(1):

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

ESTIMATED NUMBER OF INDIRECT DISCHARGERS SUBJECT TO CATEGORICAL PRETREATMENT STANDARDS

INDUSTRY CATEGORY	ESTIMATED NUMBER OF INDIRECT DISCHARGERS	FINAL STANDARD
Metal Finishing/Electroplating	10,200	X
Iron and Steel	96	X
Leather Tanning and Finishing	140	X
Aluminum Forming	59	X
Pulp and Paper Mills	250	X
Inorganic Chemicals	44	X
Porcelain Enameling	89	X
Copper Forming	32	X
Organic Chemicals and Plastics	470	—
Textile Mills	930	X
Petroleum Refining	53	X
Foundries	360	—
Coil Coating I and Canmaking	32	X
Electrical and Electronic Components	240	X
Battery Manufacturing	190	—
Nonferrous Metals	63	—
Coal Mining	0	X
Ore Mining	0	X
Steam Electric Power Plants	93	X
Pesticides	38	—
Timber Products	47	X
Pharmaceuticals	270	X
TOTAL	13,696	

PERCENT OF INDUSTRIES COVERED BY FINAL STANDARDS 93.8%

These numbers are estimates provided by EPA's Effluent Guidelines Division. Standards have yet to be proposed for Plastics, Molding & Forming and Nonferrous Metals Forming categories.

[Thirteen categorical pretreatment standards, affecting 11,316 sources, were final in September 1983 when the Third Circuit rendered its decision.]

March 22, 1984

Jim Gallup
National Pretreatment Coordinator
U.S. Environmental Protection Agency
Waterside Mall, West Tower
401 M Street SW
Washington, DC 20460

Dear Jim:

I am writing in response to your request that we provide you with the results of our Freedom of Information Act requests to EPA's Regional Pretreatment Coordinators. On February 23, 1984, we requested the Regional Pretreatment Coordinators to provide us with the following:

"The identity of any indirect dischargers in your Region (or in delegated state programs in your Region) who have sought an FDF variance from a categorical pretreatment standard."

The responses we received were prepared between February 29 and March 10, 1984. They indicate that a total of 12 companies applied for a variance. Most companies filed for a single plant, although one company filed for two of its plants, and another for 24 plants. In addition, another company filed, and then withdrew, an application.

Attached are copies of the responses from each Region so that you can see which companies are involved.

Sincerely,

Frances Dubrowski
Senior Attorney

cc: Bill Corcoran
Phil Cummings
John Doyle
Bob Hurley
Ron Outen
Charlene Sturbitts
Errol Tyler

[Letter dated February 17, 1984 from Steadman M. Overman, Director, EPA's Office of Legislative Analysis, to Honorable Arlan Stangeland, House of Representatives, enclosing EPA's responses to the questions submitted by Rep. Stangeland to Administrator William D. Ruckelshaus following the latter's testimony before the House Subcommittee on Water Resources.]

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Question: *** To what extent has the Agency, in the course of implementing the Act since 1972, employed fundamentally different factor variances in implementing the Clean Water Act? How many variances have been issued? For what types of pollutants and which industrial categories? (Please provide a detailed response for the record)

Response: ***** Since the promulgation of effluent limitations guidelines regulations (guidelines) (sic) and the implementation of these guidelines in NPDES permits, there have been 53 FDF determination requests for direct dischargers submitted to EPA Headquarters for approval; there have been four approved, 14 denied, 16 withdrawn and 19 pending requests.

The information requested on the four FDF determination requests for direct dischargers that have been approved appears on the next page.

Facility	Date of Approval	Point Source Category	Pollutants
Southern California Edison Huntington Beach Generating Station	2/22/77	Steam Electric Generating (40 CFR & 423.32(b)(6) (1974)–Boiler Blowdown	Total Suspended Solids, Oil & Grease, Total Iron, Total Copper
Southern California Edison San Onofre Nuclear Generating Station	2/22/77	Steam Electric Generating (40 CFR & 423.32(b)(6) (1974)–Boiler Blowdown	Total Suspended Solids, Oil & Grease, Total Iron, Total Copper
Birdsall Sand and Gravel, Oral, South Dakota	7/10/78	Construction Sand and Gravel Subcategory of Mineral Mining and Processing	Total Suspended Solids
Freeport Chemical Company, Uncle Sam Louisiana	6/3/81	Phosphate Subcategory of Fertilizer Manufacturing	Total Phosphorus Fluoride, Total Suspended Solids

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